United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

75-4263

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FOR THE SECOND CIRCUIT

NIAGARA MOHAWK POWER CORPORATION, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

TOWN OF MASSENA, NEW YORK, *Intervenor.*

On Petition for Review of Order of the Federal Power Commission

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BRIEF OF INTERVENOR TOWN OF MASSENA, NEW YORK

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QUESTION PRESENTED

Does the Federal Power Commission have jurisdiction to enter a remedial order where a public utility subject to its jurisdiction refuses to commit to provide transmission services over jurisdictional facilities to an entity requesting the same, which services are regularly extended to other entities, and where the regulated utility is interconnected with and purchases power from a federal licensee, which licensee is required by law to give preference in the sale of electric power and energy to the entity requesting transmission services?

COUNTERSTATEMENT OF THE CASE

Whatever may be decided on the merits of the contention by the town of Massena, New York (Massena), that the Federal Power Commission (Commission) has jurisdiction in the premises to grant relief, it cannot be said that the proceeding is a "sham" or form of "blackmail." (Brief of Niagara Mohawk at 34 and fn. *).

It likewise cannot be contended that Petitioner Niagara Mohawk is proceeding in good faith in its dealings with Massena nor that Niagara Mohawk has evidenced anything other than an attitude of corporate arrogance and disdain toward Massena's continued attempts to negotiate a transmission agreement.

Massena concedes a legitimate question concerning the jurisdiction of the Commission to order relief in this docket, and that if jurisdiction is lacking, that the proceeding should be dismissed. Massena believes, however, that the record before this Court establishes a refusal to deal with Massena on the part of Niagara Mohawk and that given the situation extant this Court should give clear guidance now on the appropriate forum for relief.

Niagara Mohawk gives this Court only a bare bone description of the relationship of the parties and the background for the litigious situation that has arisen between Massena and Niagara Mohawk. The complete story is not a happy one but it must be told for this Court to understand the pejorative accusations regularly made by Niagara Mohawk before the Commission and now here.

As indicated in its pleadings before the Commission, Massena held a referendum on May 30, 1974, to determine whether the electric distribution facilities of Niagara Mohawk should be condemned by Massena and a municipal utility established instead. The residents of Massena had a particular incentive to vote affirmatively since Massena, as a municipal utility, has a clear statutory right and

preference to low cost hydropower generated and sold by the Power Authority of the State of New York (PASNY), a licensee of the Commission and a present supplier of Niagara Mohawk. 16 U.S.C. § 836.

As fate would have it, the referendum occurred during a period of rapidly increasing fossil fuel and electric prices caused in no small part by the oil embargo and resulting cartel imposed by members of the Organization of Petroleum Exporting Countries. Due in part to the public interest in electric rates and in part to the historical antagonism between the consumer owned and privately owned sectors of the electric industry, the Massena effort to establish its own utility as a means of reducing electric rates attracted widespread attention with coverage in the national print media and on network broadcasts.

As is well known, Niagara Mohawk has been resistant to the concept of public power in its service area, to say the least. The political battle occasioned by the proposal was massive and unique for this Town of 16,000. In a later proceeding before the Public Service Commission of the State of New York,[1] Niagara Mohawk admitted to expenditures of $291,000 in fighting the Massena referendum. This total represents an expenditure of $40.57 per registered voter in Massena (7,185) which compares to a Federal limit of $.144 by a candidate for the United States Senate (18 U.S.C. § 608) and $.50 by a candidate for Governor in New York (§ 478 of the Election Law).

The referendum having passed, Massena made a firm offer to Niagara Mohawk to purchase the required distribution facilities and to ". . . enter into an agreement with the Company for the delivery of power through the Company's Browning and Andrews substations and cer-

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[1] Case No. 26824 involving Massena and Niagara Mohawk to determine the appropriate rate base dedicated to the service of present retail customers in Massena.

tain 115 kv transmission lines and facilities for transforming and delivering power from the Power Authority of the State of New York to Massena . . ." (19a-20a). Since a Massena municipal utility is premised on the availability of PASNY power and energy, and since Niagara Mohawk controls the backbone electric transmission system in and around Massena, an agreement with Niagara Mohawk to transmit PASNY power and energy is an absolute prerequisite for Massena to avail itself of the benefits of PASNY power.

As can be seen from the Joint Appendix, 29a-39a, the undersigned counsel and Lauman Martin, Esquire, Senior Vice President and General Counsel of Niagara Mohawk, then entered into an exchange of correspondence concerning the crucial subject of transmission services for Massena. While Mr. Martin's precise words are probably constructed in a precise enough fashion to forestall *sua sponte* investigation by regulatory agencies charged with both a supervision of Niagara Mohawk's activities and a consideration of the philosophy behind the anti-trust laws, Massena's frustration grew with each nebulous non response.

Accordingly, when the transmission agreement that was the subject of this proceeding was brought to Massena's attention, Massena was shocked. For, as was subsequently learned, Niagara Mohawk regularly executes transmission agreements with like utilities in New York. Yet, at the same time, the Company would bob and weave whenever the subject of transmission was raised by Massena.

Events subsequent to the correspondence before this Court in the Joint Appendix establish that the recorded words of Niagara Mohawk establish a refusal to deal.

As indicated in footnote 1 to Massena's initial filing (14a), counsel for Niagara Mohawk made a telephone call to Massena's bond counsel without first informing officials of Massena or the undersigned of his intent to do so, and

requested that Massena's bond counsel withdraw an opinion letter to the effect that Massena is presently empowered to issue debt for the planned utility. One of the reasons advanced by Niagara Mohawk's counsel was that Massena must first arrange for delivery of PASNY power and energy before establishing a utility and since Massena has yet to do so it is not yet authorized to establish a utility.

In the recent past, Massena has requested permission from the condemnation court to possess the facilities of Niagara Mohawk prior to final judgment as is permitted by Section 24 of the Condemnation Laws of New York.[2] In its filing, Massena assured the court that if early possession is allowed, Massena would be able to deliver power and energy to consumers since it has applied with the Commission for an order directing the physical interconnection of Massena's facilities with those of Niagara Mohawk (145a). In its application to the Commission, Massena did not request an order that Niagara Mohawk transmit PASNY power and energy, only that the Commission order an interconnection energized.

Niagara Mohawk has yet to file a response with the Commission, but it has responded to the condemnation court. In an affidavit submitted by James J. Miller, Vice President and Central Division Manager of Niagara Mohawk, it was urged that Massena not be allowed interim possession of the distribution facilities (attached as Appendix A). One of Mr. Miller's reasons in justifying opposition was that the "plan of establishment" encompassed the interconnection plan proposed to the Commission and that this plan ". . . embraces voluntary joint use by the Town and Niagara Mohawk of each other's distribution facilities . . ." (Appendix A at par. 14). According to Mr. Miller:

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[2] The condemnation action is *sub judice* before the County Court, County of St. Lawrence. *Town of Massena, New York* v. *Niagara Mohawk Power Corporation*, Index No. 59243.

> To the extent that joint utilization of each other's distribution facilities is contemplated, this may only be accomplished through voluntary agreement between the parties. To this date, no such voluntary agreement has been discussed. *Furthermore, as earlier indicated, Niagara Mohawk will not enter into such an agreement*, because among other reasons, it may well interfere with the quality and reliability of Niagara Mohawk's service to its other customers in its franchise area outside the Town of Massena. (Ibid. at 7) (Emphasis added).

Thus, Niagara Mohawk has made clear its anticompetitive intent. Not only will it not transmit, it will not voluntarily enter into *any* interconnection agreement notwithstanding the clear jurisdiction in the Commission to order interconnection,[3] and Niagara Mohawk will assert its intransigence as a reason for keeping Massena out of the utility business.

Niagara Mohawk has two distinct motivations for its paranoia toward Massena. First, as is generally true with investor owned utilities,[4] Niagara Mohawk fears competition from consumer owned power systems. Once Massena is successful in showing public power can expand in upstate New York, Niagara Mohawk's fear is that other communities will follow suit thus reducing Niagara Mohawk's present service area and number of captive, retail customers.

Second, as can be seen at 28a, as preference customers like Massena lay claim to PASNY power and energy, Niagara Mohawk and other investor owned utilities will have their low cost power and energy withdrawn from their use. The economic incentive for Niagara Mohawk is obvious

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[3] *Gainesville Utilities Dep't, et al.* v. *Florida Power Corp.*, 402 U.S. 515 (1971).

[4] *Cf. Otter Tail Power Co.* v. *U.S.*, 410 U.S. 366 (1973); *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747 (1973).

enough; as a net purchaser of energy from PASNY, Niagara Mohawk will have to add its own expensive generation to make up the deficit or purchase the energy elsewhere. Since there is no other public entity in sight to meet Niagara Mohawk's deficit, it would have to purchase more expensive energy from sister investor owned utilities.

Understandable as Niagara Mohawk's motives may be, they nevertheless are no justification for anticompetitive discriminatory practices. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973) (hereafter *Otter Tail*).

Faced with an intransigent Niagara Mohawk and the realities here indicated, Massena filed its protest in Docket No. E-9379. In candor, the protest was filed not to prohibit residents of New York City from receiving much needed energy through Consolidated Edison's distribution system; it was filed out of desparation to bring to light Niagara Mohawk's shoddy treatment of the people of Massena. Since Niagara Mohawk now makes such an issue of the scope of the investigation in retrospect Massena probably should have filed a more general complaint under Section 206 of the Federal Power Act, but the procedural labyrinth leading the parties to the present posture of the proceedings under Section 206 is irrelevant.

For, when the dust settled after several orders by the Commission, and after a rash of filings were made by the parties involved (*See* Niagara Mohawk Brief at 2-9), the posture of the dispute was as follows: the Consolidated Edison-Niagara Mohawk transmission agreement had effectively been approved; Massena's relief sought specifically under Section 205 of the Federal Power Act had been denied; the FPC, recognizing the serious nature of Massena's allegations, ordered a general investigation of Niagara Mohawk's allegedly anticompetitive and monopolistic practices pursuant to Section 206; and the FPC utilized the same docket number for the Section 206 investigation

as was used in the consideration of the Con Ed-Niagara Mohawk contract.

As Niagara Mohawk indicates on page 15 of its Brief, not a great deal has transpired since the investigation was ordered save for the submission of data requests by Massena and an agreement by Massena to refine the data requests at a December 12, 1975, settlement conference. What Niagara Mohawk fails to address, however, is the discussion at the same settlement conference concerning the Niagara Project contract existing between Niagara Mohawk and PASNY for "The Sale, Transmission and Distribution of Power to Niagara Mohawk Power Corporation" from PASNY, which contract is subject to the jurisdiction of the Commission and is on file there as "FPC Electric Rate Schedule No. 19." (Appendix B).

Recognizing the seriousness of the dispute, staff counsel for the Commission came prepared to discuss the present commitment *vel non* of Niagara Mohawk to deliver PASNY power under its contract for Niagara Project power. Turning to Article IX, par. 1 of the contract, counsel inquired whether the language there meant that Niagara Mohawk had already agreed to transmit Niagara Project power to Massena. The language in question provides:

> 1. Contractor (Niagara Mohawk) agrees to accept delivery of Project power and energy at the points of delivery in effect pursuant to Article III hereof, or at other points to be agreed upon, into its electric transmission system as now or hereafter existing and *to deliver* an equivalent amount of power and energy, adjusted for losses, to Authority for its own use or *for municipalities and rural electric cooperatives which are customers of Authority and are presently operating electric systems* serving rural and domestic consumers. . . .
>
> (Emphasis added)

Lauman Martin, Esquire, indicated that it did not so provide; that the language meant that Niagara Mohawk need only deliver PASNY power and energy to those preference customers existing as of July 20, 1964, the effective date of the contract, thus excluding Massena.

As will be seen, assuming *arguendo* the correctness of Mr. Martin's assertion, the existence of the Niagara Mohawk-PASNY contract provides a jurisdictional basis for the Commission to grant relief, the key issue before this Court.

Further, Massena submits that Mr. Martin's interpretation of the contract need not be accepted, and that the contract properly construed would moot the issues set for hearing by the Commission in Docket No. E-9379.[5]

ARGUMENT

I. The Federal Power Commission Has Jurisdiction To Conduct the Investigation and Grant a Remedy if Appropriate

Before turning to a discussion of what this controversy is about, it is important to state what the controversy *is not* about.

This case is not about the continued existence or non-existence of a Con Ed-Niagara Mohawk agreement to serve as a jurisdictional base upon which to rest the Commission's authority to conduct the challenged investigation.

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[5] On March 15, 1976, Massena filed a protest and petition to intervene in Docket No. ER 76-523, pertaining to the sale of nuclear generated power and energy from PASNY's FitzPatrick plant to Niagara Mohawk. The contract between the parties, like the Niagara Project contract, requires Niagara Mohawk to transmit power and energy from FitzPatrick to PASNY customers. Under the terms of that contract, it is unclear whether Niagara Mohawk's commitment to transmit extends to both present and future customers, or whether it is restrictive in Niagara Mohawk's mind in the same manner as the Niagara Project contract. In Niagara Mohawk's response, the substance of Massena's allegation of restrictiveness was not addressed. This docket would also be mooted by a correct interpretation of the Niagara Project contract.

Point I(A) of Niagara Mohawk's Brief argues basically that the Commission approved the Con Ed-Niagara Mohawk service agreement and that the agreement terminated on October 31, 1975, therefore, there is no rate or practice affecting a rate so as to allow the Commission to conduct its investigation. If this investigation was instituted to consider the justness and reasonableness of the Con Ed-Niagara Mohawk agreement there might be an agrument that the existence of the Con Ed-Niagara Mohawk agreement is a prerequisite to continuing jurisdiction in the Commission.[6]

However, the Commission did not institute an investigation of the justness and reasonableness of the Con Ed-Niagara Mohawk contract, which investigation would have been conducted pursuant to Section 205 of the Federal Power Act. Rather, this general investigation was ordered pursuant to Section 206 of the Federal Power Act at Massena's request on rehearing (59a-65a) and the investigation is not tied to nor dependent upon the Con Ed-Niagara Mohawk agreement.

Section 206, in relevant part, reads as follows:

> "(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regu-

[6] However, even this improper conception of the issues raised in this appeal is insufficient to oust the Commission of jurisdiction here. Massena alleged that the Con Ed-Niagara Mohawk agreement was part of an interstate program to monopolize the electric utility industry. Since agreements similar to the Con Ed-Niagara Mohawk agreement are entered into and lapse on an ongoing basis, the termination of the Con Ed-Niagara Mohawk agreement does not oust the Commission of jurisdiction. *Cf. Moore* v. *Ogilvie*, 394 U.S. 814 (1969).

lation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

From the clear words of the statute, all that is necessary for the FPC to conduct its investigation is that there be any practice affecting *any* rate or charge which is unjust, unreasonable, unduly discriminatory or preferential. Massena submits that there is *a* practice affecting *a* rate such that the FPC has jurisdiction to institute the investigation. The viability of the Section 206 proceeding does not depend upon the existence or the justness and reasonableness of the lapsed Con Ed-Niagara Mohawk agreement. Thus, the arguments propounded in Point I(A) of the Niagara Mohawk Brief are irrelevant to the jurisdiction of the Commission to conduct its Section 206 investigation.

Some confusion may occur as a result of the Commission utilizing the same docket number (E-9379) for the Section 206 investigation as was used for the filing of the Con Ed-Niagara Mohawk agreement. Niagara Mohawk was obviously troubled by this. *See* Niagara Mohawk Brief at 16, 29-30. Massena admits that this overlap may be confusing and that in its Order of July 23, 1975, perhaps the Commission should have utilized a different docket number for the Section 206 proceeding. However, it is the supreme exaltation of form over content for Niagara Mohawk to suggest that the Commission's failure to assign a new docket number to its independent Section 206 investigation somehow inextricably ties all subsequent Commission actions in that docket to the original issues or allegations in the docket.

Despite the fact that docket E-9379 commenced as a Section 205 proceeding, the FPC recognized the substance of Massena's allegations of anti-competitive conduct by Niagara Mohawk. Massena's allegations provide a proper jurisdictional base under Section 206 of the Federal Power Act, and the FPC properly ordered an investigation.

This conclusion is fully supported by *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), where a wholesale customer challenged a Section 205 rate increase on the ground it was barred by contract. The Court agreed but the Commission argued it could raise the rate anyway under Section 206. The Court agreed with the Commission that it possessed this authority under Section 206 and stated:

> If the proceedings here satisfied in substance the requirements of § 206(a), *it would seem immaterial that the investigation was begun as one into the reasonableness of the proposed rate rather than the existing contract rate. Ibid.* at 353 (emphasis supplied).

What the controversy really is about here is not whether the Commission is able or not to enter a remedial order in E-9379 given the fact that the agreement which precipitated the docket took effect and expired. Rather, Niagara Mohawk seeks vindication by this Court for its refusal to deal with Massena for transmission through its argument that the Commission can *never* enter any order that may lead to an enforceable obligation on the part of Niagara Mohawk to transmit PASNY power and energy to Massena. In support, Niagara Mohawk quotes at length from *Otter Tail* which admittedly found jurisdiction in the federal courts, and not the Commission, to compel transmission of electric power and energy.

Massena understands *Otter Tail's* import and recognizes that there is doubt concerning the Commission's jurisdiction in the premises to order any relief no matter how egregious Niagara Mohawk's conduct may be, but Massena submits that there is a vital difference between *Otter Tail* and the present controversy.

As indicated, Massena has a statutory right and preference to power and energy from PASNY's Niagara Project and PASNY has so recognized its obligation to serve Massena (27a-28a). PASNY, as a licensee of the Com-

mission, operates under the following Congressional mandate (16 U.S.C. § 836):

> (a) The Federal Power Commission is expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.
>
> (b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:
>
> (1) *In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance.* In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.
>
> * * *
>
> (4) *The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available* in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in paragraph (1) of this subsection, and to the neighboring States in accordance with paragraph (2) of this subsection. (Emphasis supplied.)

Rather than constructing duplicative transmission lines for the delivery of power and energy to its customers, PASNY has taken the logical step of contracting with those utilities already having transmission systems in the areas where preference customers are located. Thus the genesis of the Niagara Project contract with Niagara Mohawk.

At the same time, PASNY still has capacity surplus to the needs of its preference customers which is marketed on a withdrawable basis to non preference customers like Niagara Mohawk.

Then, the sale and transmission agreement is filed with and subject to the jurisdiction of the Commission. It is Massena's contention that under both Section 205 and 206 the Commission has jurisdiction to alter restrictive and discriminatory provisions of contracts voluntarily entered into by jurisdictional entities and submitted for ongoing supervision by the Commission. This issue simply was not addressed in *Otter Tail*.

Section 205(b) of the Federal Power Act prohibits Niagara Mohawk from making or granting ". . . any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage. . . ." Section 206(a) specifically authorizes the Commission to correct any contract which is unjust, unreasonable, unduly discriminatory or preferential where the contract affects a ". . . rate, charge, or classification . . ." subject to Commission jurisdiction.

The anti-discrimination provisions of the Federal Power Act are not to be taken lightly. They are rooted in the common law and must be vigorously enforced.

One of the basic principles of regulatory law is that when one holds a franchise, from the crown or the state, or otherwise has established a substantial monopoly control of a resource necessary for the functioning of a sub-

stantial part of society, one is bound to make that resource or the services associated with that resource available to all without discrimination, except as cost differences may justify. As Chief Justice Waite pointed out, in *Munn* v. *People of Illinois*, 4 Otto (24 U.S.) 113 (1877), in the course of an extensive review of the law providing for regulation of such monopolies,

> . . . it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum charge to make for services rendered, accommodations furnished, and articles sold. *Ibid.* at 125.

As Mr. Justice Brewer stated for the Supreme Court in *Western Union Telegraph Company* v. *Call Publishing Company*, 181 U.S. 92 (1901), in upholding a decision awarding damages to one discriminated against, to the subsequent damage of its business, by the Western Union Company (at 99-100):

> No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they may render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in modes and kinds of service and different charges based thereon. There is no case iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great

> as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling.

In *Salisbury & Spencer Ry. Co.* v. *Southern Power Co.*, 180 N.C. 422, 105 S.E. 28 (S. Ct. N.C. 1920). It was held that a public service company enjoying the right of eminent domain may be compelled by *mandamus*, to furnish electric current to the plaintiffs at the same rate, without discrimination, that the defendant furnishes it to other customers similarly situated.

In its decision in *Union Pacific Ry. Co.* v. *Goodridge*, 149 U.S. 680, 690-691 (1893), the Supreme Court noted that:

> . . . it is no proper business of a common carrier to foster particular enterprises or to build up new industries, but deriving its franchise from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality.

The rationale for the obligation upon public service companies to serve without discrimination is well stated in *Western Union Telegraph Co.* v. *Call Publishing Co.*, *supra*, and has long been applied, at common law, to other "businesses affected with a public interest." As the North Carolina Supreme Court noted in *Salisbury & Spencer Ry. Co.* v. *Southern Power Co.*, 179 N.C. 19, 101 S.E. 593 (S. Ct. N.C. 1919) at 599, "It is of the highest importance that the claims of the defendant Southern Power Company to discriminate in the rates charged by it to purchasers under like conditions shall be clearly denied by the courts." In response to a contention that defendant had no duty to sell to competing distribution systems, the court responded, *Ibid.*, that when defendant had chosen so to do:

> . . . it dedicated its property to this particular class of public use, and cannot discriminate in charge or service between the several members of this class, for this would be a license to discriminate among cotton mills as a class, furniture factories, etc.

The Court went on, *Ibid.*, to quote substantially from the succinct statement of grounds of decision by the Supreme Court in *Western Union Telegraph Cable Telegraph Co.* v. *Cumberland Telephone & Telegraph Co.*, 177 Fed. 736, (M.D. Tenn., 1910), concluded that, *Ibid.*,

> This obligation cannot be evaded, even though the purchaser of the current may be to some extent a competitor.

As the Court went on to note (at 603), since defendant had access to low-cost power not, as a practical matter, available to the plaintiffs:

> . . . the power the defendant claims of unrestricted rates and of absolute right to discriminate between purchasers would make it a depotism beyond a parallel in history.

Ultimately it is that portion of the Niagara Project contract between Niagara Mohawk and PASNY that allows Niagara Mohawk to deal in a discriminatory manner toward Massena. An order by the Commission deleting language which arguably restricts Niagara Mohawk to transmitting power for those existing customers of PASNY in 1964 would not be tantamount to an order compelling transmission to Massena, it would only vest Massena with the same third party beneficiary rights to the contract now possessed by other preference customers of PASNY.

For the Commission to enter such an order, only two facts need be established. First, it would need be shown that Massena, by virtue of the contract, suffers an undue discrimination. Second, it would need be shown that the

undue discrimination affects a rate, charge or classification.

Undue discrimination is established on the record before this Court. In all pleadings and documents filed, Niagara Mohawk has yet to assert that its refusal to provide transmission for Massena is in any way justified due to capacity limitations on its transmission lines.

As stated in *St. Michaels Utilities Comm'n* v. *Federal Power Commission*, 377 F.2d 912 (4th Cir., 1967):

> Thus it has been held that differences in rates are justified where they are predicated upon differences in facts—costs of service or otherwise—and where there exists a difference in rates which is attacked as illegally discriminatory, judicial inquiry devolves on the question of whether the record exhibits factual differences to justify classification among customers and differences among the rates charged them. *Ibid.* at 915.

The same principle is applicable here; since no facts exist which justify different treatment of Massena, the discrimination is undue.

The Niagara Mohawk contractually sanctioned discrimination also impacts and affects jurisdictional rates, charges or classifications.

The contract affects rates and charges since it results in under-utilization of transmission lines dedicated to serving wholesale customers and preference customers of PASNY. The customers of Niagara Mohawk who presently have contractual arrangements for the transmission of power must necessarily pay higher rates for that transmission due to Massena's absence from the electric distribution business. If Massena was using the transmission facilities of Niagara Mohawk, it would share with the present transmission customers of Niagara Mohawk the return on investment and cost of service of Niagara Mohawk's

electric transmission system, thus lowering the rates for transmission service to each of the present customers.

The contract affects classifications since Massena is properly classified as an entity entitled to preference under the PASNY license issued by the Commission. To the extent that Massena is precluded from utilizing Niagara Mohawk's transmission lines to take PASNY power and energy, it is precluded from becoming a customer of PASNY and is thus excluded from the license classification.

Moreover, under the circumstances presented here, where a regulated utility has submitted to the jurisdiction of the Commission a contract which is discriminatory on its face, the Commission has the jurisdiction to correct the discrimination *sua sponte* and without a hearing.

In *Georgia Power Company* v. *Federal Power Commission*, 373 F.2d 485 (5th Cir., 1967), the Commission ordered, pursuant to Sections 205 and 206 of the Federal Power Act, the elimination of discriminatory resale load ceilings imposed upon wholesale customers. As stated by the Court, the Commission:

> . . . said that the resale load ceiling provision was unduly discriminatory because it did not apply to all of the fifty municipal customers and was not applied uniformly even to those towns subject to them. It found that it was not normally consistent with the public interest for a wholesale supplier to restrict the manner in which its customer may resale the power and that Georgia Power had shown no special facts or circumstances which would establish the reasonableness of these restrictions. 373 F.2d at 486.

In rejecting petitioner's contention that the Commission had acted improperly in deleting the provisions without benefit of hearing, the Court stated:

> There is nothing in Section 206(a) which prohibits the Commission from eliminating an unlawful practice

> without simultaneously holding a full rate hearing to prescribe a proper rate. *Ibid.* at 487.

Similarly, the Court here is presented with contractual terms and conditions that are discriminatory on their face, have absolutely no justification in fact, and may be deleted by the Commission without hearing. As noted, this would not be tantamount to an order directing that Niagara Mohawk provide transmission services; it would only place Massena in the same position as other preference customers similarly situated.

Under the circumstances here, it is inconceivable to Massena that the Commission lacks jurisdiction to amend the Niagara Project contract, especially where its administration by a regulated utility and Commission licensee deprives a preference customer of its statutory right to PASNY power and energy.

II. The Niagara Project Contract Should Be Construed as Requiring Niagara Mohawk to Provide Transmission Service to Massena.

As indicated, Massena has a clear statutory right to PASNY power and energy as a preference customer. As further indicated, Niagara Mohawk construes the Niagara Project contract in a manner which excludes Massena from its coverage.

It is axiomatic that contracts should be construed in a manner consistent with law. This principle has even greater application when one of the parties to a contract is a government agency. As stated by the Tenth Circuit in *Board of Directors and Officers, Forbes Federal Credit Union* v. *National Credit Union Administration*, 477 F.2d 777 (10th Cir.), *cert. denied*, 414 U.S. 924 (1973):

> In the first place no administrative body may contract with a corporate body which it regulates in a manner contrary to the statute which it is charged with

> administering, nor in a manner which would not give full effect to the intent of Congress. . . Finally, it is a well settled principle that where a contract is susceptible of two interpretations, preference will be given to the interpretation which does not violate the law. *Ibid.* at 784 (Citations omitted).

To acquiesce in Niagara Mohawk's construction of this contract would render it illegal on two scores: it would effectively deny Massena its statutory right to preference power (*cf. United States* v. *San Francisco*, 310 U.S. 16 (1940)), and it would sanction Niagara Mohawk's refusal to provide services to Massena which is in violation of the antitrust laws (*United States of America* v. *Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912)).

While Niagara Mohawk takes solace in the contractual language pertaining to preference customers which ". . . are presently operating electric systems . . ." (Appendix B, Article IX, par.1) in denying its applicability to Massena, the contract can just as logically, and certainly with greater legal justification, be interpreted as imposing a present obligation on Niagara Mohawk to provide transmission services to Massena.

The Preamble to Part Five of the contract provides:

> Authority intends to enter into agreements pursuant to subparagraph 6 of Section 1005 of the Public Authorities Law for the sale, transmission and distribution of power and energy from the Project with municipalities and rural electric cooperatives operating electric systems serving rural and domestic consumers within Authority's Niagara market area. *Contractor has or will have in existence transmission facilities capable of transmitting Project power within the limits herein provided to such prospective purchasers from Authority.* (Emphasis supplied.)

Article IX, par. 3, provides in part:

> 3. Authority shall inform Contractor in writing at least annually of the estimated future requirements for the ensuing five (5) year period *of existing or anticipated loads of* Authority and its customers. (Emphasis supplied.)

These two provisions, read together, obviously accommodate a conclusion that Niagara Mohawk commited in 1964 to serve both existing and all future PASNY customers. The Article IX, par. 1, language admittedly detracts from this conclusion but Massena submits that the qualification that customers ". . . be presently operating electric systems . . ." should be construed as requiring that these customers be in the electric utility business on the day service commences to that customer. If the parties had intended this language to cover only pre-existing municipalities, they should have said so. Had this been made clear, it is doubtful whether the Commission would have approved the language.

III. This Controversy Is Ripe for Determination.

On February 10, 1976, Staff Counsel to the Commission moved this Court to dismiss the Petition for Review on grounds that the Orders of the Commission are not sufficiently definitive to be reviewed at this time. By order dated February 24, 1976, this Court denied said Motion without prejudice to renewal on appeal.

On the assumption that Staff Counsel will again raise this issue on appeal, Massena will briefly speak to the issue.

In determining whether an issue is sufficiently clear and definitive for purposes of review, it must be determined whether the issue is fit for judicial resolution and whether the parties involved will suffer hardship as a result of the appellate court deferring consideration of the issues. *See*

National Automatic Laundry and Cleaning Council v. v. *Shultz*, 443 F.2d 689 (D.C. Cir. 1971). *See generally Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). Application of this test to the instant proceeding indicates that judicial review at this time is proper.

The issue here is sufficiently clear and delineated for resolution by this Court. The Court must determine on the facts as alleged whether the Commission on any theory has jurisdiction to conduct the Section 206 investigation and to grant relief. A hearing to determine the substantiability of the allegations of anti-competitive conduct will not supply additional bases for jurisdiction and is not needed. The jurisdiction of the Commission must be present prior to any hearing on the merits of the allegations. As indicated by the discussion above both the issue of jurisdiction and appropriate relief can be decided on the facts as alleged and established by the record.

Further, if this case is deferred, harm will result both to Niagara Mohawk and to Massena.

Although Massena does not attempt to argue Niagara Mohawk's position, Niagara Mohawk has stated that it will be harmed by the investigation if it goes forward unnecessarily.

For Massena's part, it submits that the allegations it has presented here are allegations cognizable before and remediable by the Commission. The harm to Massena at the hands of Niagara Mohawk is continual and ongoing since its refusal to deal is raised as a barrier in the condemnation court where Massena seeks early entry into the utility business.

IV. Status of the Record on Appeal.

When Massena embarked on its intervention in E-9379 it believed that a major evidentiary proceeding would be required to establish its case in what promised to be a pro-

ceeding under Section 205. On rehearing before the Commission, Massena instead suggested a Section 206 investigation which the Commission accepted. As Niagara Mohawk continued to express its refusal to deal with Massena in various forums and Massena became more aware of the types of transmission agreements Niagara Mohawk had executed, Massena became convinced that the facts establish Massena's assertion of anticompetitive conduct and that the PASNY contracts provide a ready vehicle for summary relief.

In its reply brief Niagara Mohawk can be expected to flail at alleged improper evidentiary assertions and conclusions by Massena. Massena on the other hand is confident in its position. If this Court has any doubt of the factual underpinning of Massena's complaint, Massena suggests that the following questions be posed to Niagara Mohawk during oral argument, or otherwise:

> 1. Is Niagara Mohawk willing to transmit PASNY power and energy to Massena on the same terms and conditions it transmits power and energy to other PASNY customers similarly situated once power and energy is available from PASNY and once Massena is in possession of Niagara Mohawk's distribution facilities?
>
> 2. Will Niagara Mohawk assert before any court or regulatory agency that Massena is not authorized to establish a municipal utility since Massena is unable to arrange for the delivery of PASNY power and energy to a Massena utility?

If Niagara Mohawk answers the first question affirmatively and the second negatively, all outstanding controversies concerning transmission would be mooted. If not, the factual assertions made herein are established and this Court should direct the Commission to amend the Niagara Project contract so as to accommodate Massena, if the Court feels it is not in a position to construe the contract in the manner suggested in Section II, *supra*.

CONCLUSION

For the foregoing reasons, Massena submits that the Commission has the authority and jurisdiction to conduct the investigation required by its Order of July 23, 1975, and that this Court should remand this proceeding to the Commission with instructions to enter an Order granting Massena the relief requested herein.

Respectfully submitted,

FREDRICK D. PALMER
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APPENDICES

APPENDIX A

STATE OF NEW YORK
COUNTY COURT
COUNTY OF ST. LAWRENCE

Index No. 59243

THE TOWN OF MASSENA, *Plaintiff*,

—against—

NIAGARA MOHAWK POWER CORPORATION, *Defendant*.

JAMES J. MILLER, being duly sworn, deposes and says:

1. I am Vice President and General Manager of the Central Division of Niagara Mohawk Power Corporation, defendant in this proceeding, and am familiar with defendant's facilities in and around the Town of Massena, New York. I make this affidavit in opposition to plaintiff's motion for temporary possession pending proceedings as as April 1, 1976 or some indeterminate later date.

2. This motion, returnable almost exactly ten months after service of plaintiff's Petition for Condemnation Order, inserts entirely new proposals for acquisition and operation of defendant's property, other and different from that authorized pursuant to the Bond Resolution adopted by the Town's voters on May 30, 1974 (attached as Exhibit I hereto) or even as pleaded in the Petition for Condemnation dated March 13, 1975 as to which a motion to dismiss is now pending before this court.

3. Obviously, if defendant's motion to dismiss the petition for condemnation is granted without leave to amend there is no proceeding before this court to which the motion for temporary posession can be directed.

4. The property sought to be condemned is already presently devoted to a public use. Thus, orderly consideration of proposed condemnation of facilities of the de-

fendant can proceed without deprivation of electric service to the Town's consumers in the event a Petition for Condemnation Order, not subject to dismissal, is eventually filed in this court.

5. Acquisition of property by condemnation under a statute by which the owner may be divested of his property against his will requires full and unquestionable compliance with the Condemnation Law and, additionally, in the case of a Town, also at least compliance with the relevant requirements of the General Municipal Law and the Local Finance Law particularly where the unusual action to grant temporary possession is sought to be authorized.

6. The instant motion for temporary possession, unlike the usual requested occupancy of a single piece of property or the immediate taking of a complete, separate utility service, involves not only temporary possession of certain of defendant's facilities but additionally the execution voluntarily by defendant of an agreement involving an intricate series of contractual arrangements which might give rise to adverse effects on service presently rendered by defendant to customers in defendant's franchise area outside the Town of Massena.

7. Plaintiff's motion for temporary possession is admittedly indefinite as to its effective date; it is admittedly depending for effectiveness on action by the Federal Power Commission (FPC), for which application has just been filed by plaintiff and which defendant will vigorously resist; it requires successful negotiation of a power supply contract with the Power Authority of the State of New York (PASNY), hearing before PASNY on such a contract and subsequent approval thereof by the Governor of the State of New York (Public Authority Law—Section 1009), before power starts to flow. Absent evidence to this court that contractual arrangements with defendant have been effected, that FPC has legally ordered defendant to

comply with the relief sought by plaintiff from FPC, that PASNY has effectively contracted to supply plaintiff's power requirements, the motion for a temporary possession order is grossly premature, almost to the point of effrontery. The necessary predicates for an order for temporary possession, while ingeniously created, are not before this court and the jurisdiction of the court to grant an order for temporary possession is completely lacking since the motion is based on contingencies which may or may not come to fruition.

8. Section 360 of the General Municipal Law authorizes any municipal corporation to establish, own, and operate its own electric distribution system. Section 360 also provides a specific procedure by which such municipal corporations must proceed in order to effectuate that authority. Essential components of the procedure are appropriate legislative action by the local legislative body and the approval thereof by the electorate in a mandatory referendum. The legislative action which is submitted to the voters must specify "The proposed method of . . . acquiring, the plant and facilities for such service, together with both the maximum and the estimated costs thereof, and the method of furnishing such service" (General Municipal Law § 360).

9. On November 30, 1973, R. W. Beck and Associates submitted to the Village and Town of Massena a "Feasibility Report on Acquisition and Operation of the Electric Distribution System Serving the Village and Town of Massena" (hereinafter the "Beck Report" and referred to in Paragraph 9 of Petition for Condemnation Order). A copy of said report is attached hereto and designated Exhibit H. The substance of said Report was presented to the people of the Town of Massena at various times and locations between its submittal and the date of the referendum, May 30, 1974. In particular, such a presentation was made by Robert G. Taylor, a partner in R. W.

Beck and Associates, on January 17, 1974, at which time a prepared summary of Mr. Taylor's remarks was made available to any interested person.

10. On April 16, 1974, in apparent reliance on the Beck Report and the presentations made, the Town Board of the Town of Massena adopted the above identified resolution (Exhibit I) purporting to authorize the Town to establish, own and operate a public utility service system. On May 30, 1974, the voters of the Town approved said resolution in a mandatory referendum.

11. On November 12, 1974, the Town transmitted to Niagara Mohawk an "Offer to Purchase Electric Properties of the Niagara Mohawk Power Company by the Town of Massena, New York", together with a letter of transmittal dated November 12, 1974 from the Chairman of the Board of Supervisors and the Town Attorney (hereinafter the "Purchase Offer" and referred to in Paragraph 9 of Petition for Condemnation Order). The letter of transmittal specifically recites that "This offer is made pursuant to the authority vested in the Town of Massena, by the registered voters thereof in a special referendum held May 30, 1974." A copy of said Purchase Offer is attached hereto and designated Exhibit III.

12. By the aforementioned Exhibits I and II, plaintiff set forth in detail the methods by which it proposed to establish and furnish a completely separate public utility service system. Plaintiff now seeks completely to alter the methods of establishing said system, in violation of the voter-authorized methods.

13. The proposed plan of establishment of the Massena Municipal Electric Utility now requires the development of an interconnection agreement between the Town and Niagara Mohawk, as stated in Exhibit D (FPC) to plaintiff's Affidavit in support of plaintiff's motion for temporary possession. The agreement as presented is for an

indeterminate length of time, contrary to the Town's earlier representations, as detailed below.

The Beck Report (Exhibit II) page II-4 proposes interconnection for two (2) years to provide the time necessary to construct the necessary substation, transmission line, and related facilities required to establish a direct supply of power and energy from PASNY.

The resolution of the Town Board (Exhibit I) Sections 3 and 4, similarly recognizes the need of an interconnection agreement covering the period of construction of the above-mentioned transmission facilities.

The Purchase Offer (Exhibit III) reiterates the basic premise of the Beck Report dealing with the need for an interconnection agreement, but proposes that such agreement be "for a time certain to accommodate the needs of Massena."

While the Petition and the proposed Amended Petition in this proceeding do not mention any interconnection agreement, a Press Release issued the day following the filing of the proposed Amended Petition speaks of "a revised plan of interconnection." A copy of said Press Release is attached hereto and designated Exhibit IV.

14. The proposed plan of establishment of the Massena Municipal Electric Utility now embraces voluntary joint use by the Town and Niagara Mohawk of each other's distribution facilities, as stated in Exhibit D (FPC) to plaintiff's Affidavit in support of plaintiff's motion for temporary possession. This conflicts with the Town's earlier representations and authorizations as detailed below. To the extent that joint utilization of each other's distribution facilities is contemplated, this may only be accomplished through voluntary agreement between the parties. To this date, no such voluntary agreement has been discussed. Furthermore, as earlier indicated, Niagara Mohawk will not enter into such an agreement, because, among other

reasons, it may well interfere with the quality and reliability of Niagara Mohawk's service to its other customers in its franchise area outside the Town of Massena.

The Beck Report (Exhibit II) Section II, states that six crossings of the Town line by 4800 volt primaries would necessarily have to be disconnected. Furthermore, it adds that all costs associated with the disconnection of these 4800 volt primaries at the Town limits would be payable by the Village and Town of Massena as part of the cost of acquisition. Although the accomplishment of these disconnections would take some period of time, there was no discussion of maintaining these crossings in their present form. Severance was clearly indicated. Also, on page IV-11, an allocation of $1,300,000 is provided for the cost of severance and reconnection of the electric system.

The Town Board resolution (Exhibit I) Section 4, makes clear that the ultimate goal was to set up the municipal electric utility as a system separate and apart from permanent interconnection with defendant's facilities. In addition, Section 2 of Exhibit 1 authorizes additions to the utility service system to realize this goal.

The Purchase Offer (Exhibit III), paragraph 1(b), stipulates a sum certain of "$448,000 to compensate for all *severance costs*" resulting from Massena's action.

The Petition for Condemnation Order (paragraph 10), alleges a value of "$2,985,000, including reasonable compensation for any *severance damages.*" This figure of $2,985,000 is the arithmetic sum of $2,352,000 for clear title to the utility properties of Niagara Mohawk, *$448,000 to compensate for all severance costs and damages,* and $185,000 for net additions and improvements since December 31, 1973, all of which are enumerated in the Purchase Offer (Exhibit III).

The proposed Amended Petition (paragraph 4A) alleges that "Defendant will suffer no severance damages as a

result of the condemnation of the facilities described herein."

The Press Release (Exhibit IV) mentions that the Town has reduced its offer "based on a revised plan of interconnection between the town's utility and Niagara Mohawk that avoids any severance damage to the company."

15. The proposed plan of establishment of the Massena Municipal Electric Utility for the first time in these proceedings suggests the development of a "Borderline Agreement", as stated throughout Exhibit D (FPC) to plaintiff's Affidavit in support of plaintiff's motion for temporary possession, although no such proposal has been advanced to Niagara Mohawk.

16. The proposed plan of establishment of the Massena Municipal Electric Utlity, as presently constituted in accordance with the scheme for acquisition of defendant's facilities to be operated as outlined in plaintiff's application to the FPC, deviates drastically and radically from that authorized by the Town Board and approved by the voters. Furthermore, by reason of the foregoing, the plaintiff is *not* "entitled to take and hold" the property sought to be condemned, and therefore has not complied with Section 4(8) of the Condemnation Law.

/s/ James J. Miller
James J. Miller

APPENDIX B

NIAGARA MOHAWK POWER CORPORATION

NAMES OF OTHER UTILITIES RENDERING OR RECEIVING SERVICE UNDER THIS RATE SCHEDULE

POWER AUTHORITY OF THE STATE OF NEW YORK

BRIEF DESCRIPTION OF SERVICE PROVIDED UNDER THIS RATE SCHEDULE

Use of Niagara Mohawk's facilities to effect the transmission and delivery of power and energy from the Niagara power development to customers of Power Authority.

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* * *

PART FIVE

Transmission Service For Municipalities And Rural Electric Cooperatives

Authority intends to enter into agreements pursuant to subparagraph 6 of Section 1005 of the Public Authorities Law for the sale, transmission and distribution of power and energy from the Project with municipalities and rural electric cooperatives operating electric systems serving rural and domestic consumers within Autnority's Niagara market area. Contractor has or will have in existence transmission facilities capable of transmitting Project power within the limits herein provided to such prospective purchasers from Authority.

Article IX

Use of Contractor's Facilities

1. Contractor hereby agrees to accept delivery of Project power and energy at the points of delivery in effect pursuant to Article III hereof, or at other points to be agreed upon, into its electric transmission system as now or hereafter existing and to deliver an equivalent amount of electric power and energy, adjusted for losses, to Authority for its own use or for municipalities and rural electric cooperatives which are customers of Authority and are presently operating electric systems serving rural and domestic consumers and for such other loads and customers of Authority as may be mutually agreed. Contractor shall make such delivery at such points as Authority may from time to time designate on the system of Contractor upon the conditions hereinafter provided to the extent that Contractor has available transmission capacity in its system therefor.

This agreement shall include the use of all facilities of Contractor, including transforming, switching, control and protective equipment, necessary or used in the transmission and delivery of such electric power and energy. In furtherance of this agreement, Contractor shall, upon request of Authority, make the arrangements necessary to permit such connections to Contractor's electric transmission system as may be necessary, as determined by Contractor, to receive electric power and energy of Authority into and to transmit and deliver electric power and energy from Contractor's system pursuant to the terms of this contract.

2. When conditions on the electric transmission system of Contractor render Contractor temporarily unable to supply the requirements of Contractor's customers and in addition to deliver energy required by Authority for itself and its customers, necessary curtailment of loads will be

effected in a manner that will cause least hardship to the entire area affected, without regard to the entity serving the load. General procedure for effecting necessary curtailment will be agreed upon in advance by Authority and Contractor.

3. Authority shall inform Contractor in writing at least annually of the estimated future requirements for the ensuing five (5) year period of existing or anticipated loads of Authority and its customers as herein specified. Within ninety (90) days after receipt of such estimate, Contractor shall inform Authority in writing whether or not it will be able to deliver the power and energy to meet each load included in such estimate, stating any qualifications as to voltage, point of delivery or amount of delivery that attached to any affirmative answer. Thereupon, subject to such qualifications for each load on which an affirmative answer is given, it shall be obligated to make the capacity of its electric transmission system available to the extent of the load estimates for the entire five year period.

* * *

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

Niagara Mohawk Power Corporation,	)	
	)	
Petitioner,	)	
	)	
v.	)	75-4263
	)	
Federal Power Commission,	)	
	)	
Respondent,	)	
	)	
Town of Massena, New York,	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I, Fredrick D. Palmer, Attorney for the Intervenor in the above-titled action, hereby certify that on the 2d day of April, 1976, I served the attached Brief of Intervenor by depositing copies in the United States mail, postage prepaid, to all parties of record as follows:

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